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Nos. 84-884 and 84-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, ET AL.

NORFOLK AND WESTERN RAILWAY COMPANY, CHESSIE SYSTEM RAILROADS, AND SEABOARD SYSTEM RAILROAD, INC.
Petitioners,

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, ET AL.

On Petitions For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR RESPONDENTS EASTERN COAL TRANSPORTATION CONFERENCE AND COASTAL STATES ENERGY COMPANY IN OPPOSITION

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QUESTION PRESENTED

The Administrative Procedures Act (5 U.S.C. §706) charges courts reviewing administrative agency decisions to "decide all relevant questions of law, interpret . . . statutory provisions, and . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Typically, after a court detects and corrects an error of law the appropriate course is to send the matter back to the agency for reconsideration.

Applying this standard, the Court of Appeals vacated and remanded a decision of the Interstate Commerce Commission which purported to exempt from all regulation the rail transportation of export coal. The court took this action because the ICC, in exercising its authority under 49 U.S.C. §10505, had based a critical conclusion—that continued regulation was not necessary to protect export coal shippers from abuse of railroad market power—on a construction of that statutory concept that failed to reflect, and actually conflicted with, the standards and policy goals established by Congress to protect shippers exposed to railroad market power.

The question presented in this case is:

> Whether the Court of Appeals was within its authority in vacating an ICC decision relying upon a construction of the statutory concept of "abuse of market power" which conflicted with applicable legal standards and policies prescribed by Congress.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS EASTERN COAL TRANSPORTATION CONFERENCE AND COASTAL STATES ENERGY COMPANY IN OPPOSITION

Respondents Eastern Coal Transportation Conference ("ECTC") and Coastal States Energy Company ("Coastal") oppose the requests by Petitioners Interstate Commerce Commission ("ICC" or "Commission") and Norfolk & Western Railway Company, et al. ("Railroads") for issuance of a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit.

STATEMENT

In the decision below, a unanimous panel of the Court of Appeals found that the Interstate Commerce Commission—in applying 49 U.S.C. §10505 to exempt from the Interstate Commerce Act the rail transportation of coal bound for export—had provided inadequate support for a critical element of its decision: that export coal shippers subject to railroad market power would not be exposed to abuse of that power, i.e., to unreasonable rates, in the absence of regulation (Pet. App. 75a, 83a-84a, 87a). The court based its conclusion principally on the fact that the Commission, in finding[1] that shippers would not be subject to abuse of rail market power, and thus that rail rates on export coal would not exceed reasonable levels, gave no consideration to the factors prescribed by Congress for use in determining whether railroad rates are "reasonable." It likewise did not discuss how the policy goals reflected in those statutory standards would be met absent regulation. Instead, the Commission erroneously applied a test which is in conflict with the Interstate Commerce Act, without offering an explanation as to the basis for its use or its consistency with Section 10505. The Court of Appeals, after explaining these errors (Pet. App. 36a-45a), *vacated*[2] the agency's decision and *remanded* the matter for further proceedings.

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[1] Pursuant to 49 U.S.C. §10505(a)(2)(B).

[2] In its Petition, the Commission characterizes the Court of Appeals' action as a reversal, and a "judicial repeal" of Section 10505, apparently in an effort to portray that action as precluding the Commission from ever granting exemptions of the type at issue here. *See*, e.g., ICC Pet. at 8, 12, 13. The Commission's apparent need to mischaracterize this aspect of the Court of Appeals' decision implies the erstwhile absence of legitimate cause for intervention by this Court. *See* pp. 16-20, *infra*.

A. The Staggers Rail Act and Congress' Concern for Coal

In recent years, railroads and the ICC have urged a one-dimensional view of the Staggers Rail Act of 1980;[3] to wit, that its only purpose was to deregulate the railroad industry. That view is faithfully repeated before this Court. See ICC Pet. at 2-5; Railroads' Pet. at 6-7. As the Court of Appeals recognized, however (Pet. App. 8a-9a), Congress had more in mind.

While one of its goals was to reduce regulation where the railroads face competition, Congress also was careful to retain regulatory protection (particularly in the rate area) for shippers that remained subject to rail market power. See S. Rep. No. 96-470, 96th Cong. 1st Sess. 17 (1979); H.R. Rep. No. 96-1035, 96th Cong. 2d Sess. 38-39 (1980); 126 Cong. Rec. 28233 (1980). The bill that was finally signed by President Carter represented a compromise in the classic sense, designed to "provide a regulatory process that *balances* the needs of carriers, shippers, and the public." H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 80 (1980) (emphasis added); see also 126 Cong. Rec. 28433-34 (1980).

Of all the commodities shipped by rail, none received more attention during the deliberations over the Staggers Act than coal. Noting the "many substantial [rate] increases imposed on this traffic in the last several years,"[4] Congress served notice that coal shippers—both domestic and export—were not to be the beasts of burden in a drive for railroad profits. Thus, in its only substantive comment on the new Rail Transportation Policy (49 U.S.C. §10101a), the Committee on Conference on the Staggers Act wrote:

> The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy

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[3] Pub. L. No. 96-448,94 Stat. 1895 (1980).

[4] S. Rep. No. 96-470, *supra* at 7.

> independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

H.R. Rep. No. 96-1430, *supra* at 80.

It was in the context of this policy of balancing interests that modifications were made to the standards governing the Commission's exemption authority. The Senate Commerce Committee, for example, took pains to point out that shipper rate protections were not to be forfeited through the use of that authority:

> [A]s noted above, the Commission may not grant exemptions which are beyond the "limited scope" language of existing law if continued regulation is needed to "protect shippers from the abuse of market power." The purpose of this language is to reemphasize the Committee's concern that greater use of the exemption power should not be at the expense of captive shippers who have no reasonable transportation alternatives.

S. Rep. No. 96-470, *supra* at 43.[5] The Committee on Conference also made it clear that the Commission's exercise of its exemption power was to reflect the general statutory and policy framework of the Staggers Act *as a whole*:

> The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices *not yet addressed by Congress* to determine where they can be deregulated *consistent with the policies of Congress*. The conferees expect

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[5] A key Staggers Act sponsor echoed this theme, with specific reference to export coal movements:

> As coal production and coal markets grow in the future, any boom for both the coal industry and the railroad industry with its related increase in employment of men in both fields, will never be achieved unless domestic rail rates are kept at reasonable levels to permit U.S. coal to compete in world markets.

126 Cong. Rec. 24825-26 (1980).

> that, *consistent with the policies of this Act*, the Commission will pursue partial and complete exemptions from remaining regulation.

H.R. Rep. No. 96-1430, *supra* at 105 (emphasis added). Congress made it plain that in determining, e.g., whether continued regulation is "necessary to protect shippers from abuse of market power," the Commission cannot be oblivious to relevant standards and policies lodged elsewhere in the Act. They are both guidelines for and restraints on the proper exercise of the exemption power.

B. The Commission's Decision

Shortly after the filing by export coal shippers of a comprehensive challenge to the rates on virtually all movements of export coal,[6] the Norfolk & Western Railway Company—the Nation's principal carrier of export steam coal—petitioned the Commission to exempt from all provisions of the Interstate Commerce Act export coal movements bound for Atlantic and Gulf ports. The petition was supported by the Chessie System and Family Lines Railroads (both are now part of CSX Corporation)—the Nation's principal haulers of metallurgical export coal.[7]

Opponents of the exemption[8] submitted evidence which showed most export coal to be subject to rail market power.

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[6] ICC Docket No. 38301S; *see* ICC Pet. at 7 n.6.

[7] Steam coal is primarily used for the generation of electricity, while metallurgical or "coking" coal is essential to the steel production process. *See* Pet. App. 54a. The Norfolk & Western handles over 90% of all eastern steam coal exports (Pet. App. 21a n.12). In 1980, CSX carriers handled 81% of all "met" coal exports (Pet. App. 21a n.12). This market division with Norfolk & Western is stark in light of the Commission's finding that each is the near-exclusive handler of its respective share: "[c]oal originating on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's own export coal facility." Pet. App. 61a.

[8] Comments in opposition were filed by coal producers and producer organizations, shippers, domestic utility companies, ports, the ICC's

In the absence of regulation, these shippers would be exposed to abuse of that power (principally in the form of unreasonable rates), notwithstanding that the world buying market imposed an upward limit on delivered export coal prices. Supporters of the exemption, on the other hand, claimed that railroads did not enjoy market power over shippers in most instances.[9] Even where such power was present, they argued, the world market "cap" together with the railroads' economic self-interest would prevent carriers from raising rates to the point where producers left the market or went out of business.[10] So long as rail rates did not cause declines in overall export volume, the proponents argued, the railroads would not be "abusing" their market power.[11]

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own Office of Special Counsel, the U.S. Departments of State and Commerce, and the U.S. Trade Representative. Parties supporting the exemption included the petitioning railroads and the U.S. Department of Transportation (Pet. App. 51a).

[9] The carriers argued that even though 95% of the mines producing coal for export were captive to a single railroad, market power was not present since the companies that operated them controlled export mines located on different carriers as well. *See* Pet. App. 19a-20a. Opponents countered with evidence showing that only 24% of the mines served by the eastern carriers were controlled by companies that also controlled mines on other railroads. *See* Pet. App. 21a-22a.

[10] Proponents also pointed to a comparison of export coal prices and rail rates which showed that between 1969 and 1981 the former had risen more than the latter. *See* Pet. App. 25a. As opponents noted, however, railroads were heavily regulated prior to 1976. From *1976* to 1981, utilizing new rate freedoms, carrier rates on metallurgical coal rose by 59.5%. During the same period, minehead prices for the same product *declined* by almost 9%. *See* Pet. App. 26a, n.17.

[11] It is important to note that in the area of rates—the principal focus of this case—an exemption under Section 10505 is wholly unnecessary to free carriers without market power from regulation. Congress already achieved that objective through the enactment of Section 10709, which prohibits the ICC from exercising jurisdiction over any rates that are not set by carriers possessing "market dominance" over the traffic in question. Moreover, *any* carrier—regardless of market power—is free

On March 3, 1983, the ICC announced that it had voted 3-2 to grant the full exemption proposed by the Railroads. An opinion explaining the decision was served three months later.[12]

Accompanied by a vigorous dissent by Chairman Reese H. Taylor, Jr., the Commission's opinion based the exemption on grounds substantially the same as those asserted by the Railroads.[13] Concluding that a "substantial" number of export shippers "often" are able to take advantage of competitive alternatives (e.g., Pet. App. 61a, 74a, 84a), the Commission rejected claims of complete railroad market power over export coal traffic. Acknowledging, however,[14] that an

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to *lower* its rates at any time, subject only to a floor set according to its directly variable cost of service. In practical terms, therefore, the principal effect of an exemption in this case would be to grant railroads the unfettered right to raise rates on export coal traffic over which they exert market power, without the threat of regulatory intervention should shippers object.

[12] The draft decision initially prepared for the Commission by the ICC staff concluded that the exemption should *not* be granted (Pet. App. 114a). Preparation of a new decision—supporting the result of the vote—caused the delay.

[13] The similarities between the ICC's findings and the Railroads' arguments were noted by Chairman Taylor: "I appreciate the majority's summation of the proponent railroads' comments but feel that perhaps a more neutral approach would provide a better basis on which to rationally decide this important case." (Pet. App. 92a).

[14] The Commission's handling of rail pricing under an exemption assumes significant rail market power over export coal traffic. Throughout its decision (Pet. App. 66a, 78a, 83a-84a), the Commission cast the Railroads' future pricing in the context of first-degree price discrimination, a model which is only applicable to firms with substantial market power. *See* R. BORK, THE ANTITRUST PARADOX 395 (1978); R. POSNER, ANTITRUST LAW 63 (1976). Implicit acknowledgement of rail market power is also evident from the fact that for all its discussion of competition, the Commission based its decision on its view of the potential for abuse, rather than on an absence of market power itself. Moreover, the Commission went to pains to distance itself from a finding of a completely competitive environment, concluding that "the

undetermined number of export shippers *were* subject to rail market power, the Commission justified the exemption on the basis of its conclusion that an exemption was not likely to lead to an abuse of that power. See Pet. App. 82a.

The Commission's discussion focused on market power abuse in the form of unreasonable rates, which in turn would impact upon the allocation of available export coal "rents" between shipper/producers and carriers (Pet. App. 65a, 82a-84a). In concluding that export coal rates under an exemption would not rise to unreasonable levels, however, the Commission did not rely on the reasonable rate standards and policies reflected in either the Interstate Commerce Act (e.g., 49 U.S.C. §§10704(a), 10707a(e)(2)(C)) or the Commission's own *Coal Rate Guidelines*.[15] Its conclusion instead was based on the railroads' self-interest and the so-called "world price cap." Pet. App. 83a. So long as producers were able to sell coal at prices sufficient to cover costs and stay in business, the Commission found, railroad rates would be "reasonable" and rail market power would not be abused (Pet. App. 83a-84a).

C. The Court of Appeals Decision

The point on which the Court of Appeals' unanimous decision turned was quite narrow. The court held the Commission could not conclude that absent regulation traffic subject to rail market power would not be subject to abuse, i.e., the imposition of unreasonable rates, without offering an explanation that reflected the standards and policies

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issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse." Pet. App. 82a (emphasis in original).

[15] Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide*, Decision served February 24, 1983.

prescribed by Congress for consideration in determining rate reasonableness (Pet. App. 44a-46a).[16]

The court began with a discussion of the opposing parties' positions on the subject of competition (Pet. App. 11a-26a). While noting that an exemption could be grounded upon a finding of an absence of railroad market power (Pet. App. 28a), the court observed that in this case the Commission had not made such a finding. Instead, the Commission had acknowledged the existence of rail market power over segments of export coal traffic, with the case turning on the potential for "abuse" (Pet. App. 28a-31a).[17]

The Court of Appeals therefore focused on an examination of the standard used by the Commission in arriving at its central finding on the issue of market power abuse: that export coal rates under an exemption would be "reasonable" (Pet. App. 27a, 36a-38a).

The court rejected the Commission's conclusion that the "abuse of market power" test of Section 10505(a)(2)(B) could be satisfied through application of a standard which ignored the level of rates charged by railroads exercising market power "so long as coal shippers are not forced to reduce production (i.e., so long as the rail rate leaves them a share of the revenue that covers their costs . . . ") (Pet. App. 37a). This view, which the court characterized as regulatory "indifference," was wholly inconsistent with the standards and policies prescribed by Congress for measuring rate reasonableness (Pet. App. 44a). Particularly as set forth in the

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[16] These standards and policies are set forth in, e.g., 49 U.S.C. §10704(a)(2), 10701a(e)(1) and 10707a(e)(2)(C). In 1983, the Commission proposed a methodology of general application for use in implementing these standards in the context of captive coal traffic in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide*, *supra*.

[17] The Court based this observation on the Commission's own framing of the issue (Pet. App. 82a; note 14, *supra*), and on its extensive use of the first-degree price discrimination model to predict future railroad rate behavior (Pet. App. 29a-31a).

so-called "Long-Cannon Amendment" (49 U.S.C. §10707a(e)(2)(C)) and Section 10707a(e)(1)'s admonition against "excessive profits," these standards effectuated Congress' intent to "limit the rate freedom of carriers with market power" (Pet. App. 42a), and maintain a balance in shipper-carrier relations under the Staggers Act (Pet. App. 45a). Because Congress had decreed these policies to be factors in *all* rate reasonableness determinations, the Commission could not ignore them altogether in its generic evaluation of rates on export coal under Section 10505(a)(2)(B) and the National Rail Transportation Policy (49 U.S.C. §10101a(6)) (Pet. App. 42a-45a). Those provisions instead "should be read as reflecting the policies of the statutory scheme of which they are a part" (Pet. App. 44a). To give effect to Congress' policy as reflected in that statutory scheme, the court concluded, vacation and remand was required (Pet. App. 47a).

ARGUMENT

The Court of Appeals' decision was a reasonable and properly limited exercise of judicial authority which neither raises a serious federal question nor conflicts with prior decisions of this Court or the courts of appeals of other circuits. The decision has no real impact beyond the four corners of this case, has no effect on any other statute or statutory provision, and raises no new barriers to the proper exercise of ICC authority under 49 U.S.C. §10505. Particularly in light of the fact that the entire matter is now back before the ICC on remand, and is therefore far from final in any practical sense, this case presents a wholly inappropriate object for investment of this Court's time and resources. The Petitions for Writ of Certiorari should be denied.

I

THE COURT OF APPEALS DECISION WAS A REASONABLE AND PROPERLY LIMITED EXERCISE OF JUDICIAL AUTHORITY WHICH RAISES NO SUBSTANTIAL FEDERAL QUESTION

Export coal shippers may be divided into two groups: those that enjoy competitive transportation alternatives, and those that are subject to rail market power. This case deals solely with the second group, and the Commission's conclusion that rates on their traffic—in the absence of regulation—will be "reasonable." Finding that the only standard articulated by the ICC in reaching this conclusion was inadequately explained and legally deficient under the Act, the court remanded for further consideration. This action—which constitutes the sum and substance of the court's involvement—raises no substantial federal question as would justify intervention by this Court. Rather, it bears all the marks of an ordinary agency review proceeding.

As noted by the Court of Appeals, the Commission could have based its decision on a finding the railroads do not possess market power over export coal shippers (Pet. App. 28a).[18] The Commission, however, did *not* make such a finding; its conclusion under Section 10505(a)(2)(B) was that notwithstanding rail market power over a segment of export coal shippers,[19] continued application of the Interstate Commerce Act was not necessary to prevent abuse

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[18] The Railroads have attempted to turn this observation into a separately-imposed prerequisite to exemption (Railroad Pet. at 20-22), but a plain reading of the opinion shows the court was merely stating the obvious: there can be no abuse of market power if there is no market power (Pet. App. 28a).

[19] The parties below clearly differed as to the magnitude of this power, but all acknowledged—in one way or another—its existence. For its part, the Commission showed its presumption of market power through repeated references to a rail pricing theory that can only be used by companies with substantial market power (Pet. App. 66a, 75a,

(Pet. App. 82a, 85a-87a).[20] The Court of Appeals therefore looked for the Commission's explanation of how those shippers *who do not benefit from competition* would be protected from abusive rate and service practices (Pet. App. 36a-37a).

What the court found was a discussion of market power abuse which focused principally on the question of rates; i.e., whether rates on export coal traffic subject to rail market power would be "reasonable."[21]

78a-79a, 83a, 84a, 86a) and its specific avoidance of a conclusion that the railroads do not possess market power over export coal (Pet. App. 82a).

[20] It is here that this case differs from two decisions which feature prominently in the Petitions and the United States' Brief: *American Trucking Ass'ns.* v. *I.C.C.*, 656 F.2d 1115 (5th Cir. 1981) and *Brae Corp.* v. *I.C.C.*, 740 F.2d 1023 (D.C. Cir. 1984). In *ATA*, the exemption for trailer-on-flatcar traffic "was based primarily" on the ICC's findings of extensive inter- and intramodal competition and an absence of rail market power. *See* 656 F.2d at 1115. Additionally, the exemption there at issue was *specifically contemplated* by Congress in enacting the Staggers Act. *See* 49 U.S.C. §10505(f). Similarly, in *Brae* the "linchpin" of the ICC's exemption finding with respect to rates charged shippers was "the presence of pervasive truck competition—its conclusion that goods transportable by boxcars can also, in the vast majority of cases, be carried by trucks." 740 F.2d at 1036.

The ICC seeks to draw additional parallels between this case and *Brae* based upon the latter's conclusions regarding the relationship between large and small rail carriers in the area of joint rate divisions (ICC Pet. at 12). What the ICC fails to point out, however, is that Section 10505(a)(2)(B) mandates consideration of the treatment of *shippers* by railroads possessing market power. There is no similar mandate vis-a-vis the interests of small *carriers*. What may have been judicial overreaching in *Brae*, therefore (a point not at issue here), was fully consistent with the applicable statute in this case.

[21] This focus was entirely appropriate, given the policy favoring reasonable rates set forth in Section 10101a(6) and the Conference Report on the Staggers Act (H.R. Rep. No. 96-1430, *supra* at 80), the attention given the issue in the comments of opponents of the exemption, and its status as the policy goal most threatened by the exemption. In addition, as noted in *Brae*, the presence of unreasonable rates is a clear "symptom" of market power abuse. *See* 740 F.2d at 1036.

The standard employed by the Commission in answering this question, however, was unlike anything which appears in the Act's provisions regarding maximum reasonable rate evaluations, or the ICC's own pending coal rate policy proposal (*Ex Parte No. 347 (Sub-No. 1), supra*). Without any explanation of its basis or rationality under the Act, the Commission made the determination that:

> the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate *all* of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

Pet. App. 83a (emphasis supplied).[22]

Since the Commission relied upon this standard in construing the mandate of Section 10505(a)(2)(B),[23] proper discharge of the court's duty under the Administrative Procedures Act required that it carefully consider that standard

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[22] The United States denies that this was considered by the ICC to be a "standard" for market power abuse (United States Br. at 16, 18), and further contends that the Commission was under no obligation to articulate such a standard (*id.* at 20 n.17).

The United States' first point is met not only by the quotation in the text, wherein the Commission clearly postulates its view as to what would constitute market power abuse (i.e., its "standard"), but by the ICC's own Petition before this Court, which describes how "[t]he ICC articulated the legal standard of 'indifference' to particular rate levels . . ." (ICC Pet. at 17). The Government's second point is incorrect as a matter of law. The ICC's central substantive finding in this case was that there would be no abuse of railroad market power. Without articulating a standard of *any* sort, the ICC would be leaving no discernable "path" for a court to follow on review. Remand would be necessary as a matter of course. *Cf. Bowman Transp., Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974); *Yonkers* v. *United States*, 320 U.S. 685 (1944).

[23] In its Petition, the ICC offers an alternative "standard," whereunder future rates would be found reasonable because it could be assumed they would be "similar to those in the past." ICC Pet. at 17. The fundamental problem with this "standard" is that it presumes the

within the framework of the Act as a whole,[24] and set it aside if it was found to rest on an "erroneous legal foundation." *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956).

The court's conclusion that the standard employed by the ICC *was* legally erroneous was clearly correct. In blessing as "reasonable" any rate which was not so high as to preclude a shipper from covering his costs, and thus force him out of business (Pet. App. 37a), the Commission had endorsed a standard that would at most guard only against grossly exploitive railroad pricing. Such a position is an abdication of the agency's responsibility vis-a-vis the maintenance of "reasonable" rates. See *Farmers Union Central Exchange* v. *F.E.R.C.*, 734 F.2d 1486, 1503-04 (D.C. Cir.), *cert. denied* 105 S.Ct. 507 (1984).[25] The ICC and the United States (ICC Pet. at 15; United States Br. at 17) object to the Court of Appeals requiring the Commission—if it is simply to rely on competition to keep rates (including those on traffic

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reasonableness of rates that are presently under challenge before the ICC (in *Docket No. 38301S*), then uses that presumption to justify an exemption for those same rates, the effect of which is to preclude a final decision adjudicating their reasonableness. Since the ICC also maintains it is under no obligation to consider the standards and policies of the Act regarding reasonable rates in using Section 10505 to exempt traffic from rate regulation (ICC Pet. at 18-22), the logical outgrowth of this Catch-22 is the absurd scenario whereunder the best defense to the filing of a complaint challenging the reasonableness of a rail rate is a petition to exempt that rate from regulation.

[24] *See U.S.* v. *Morton*, ___ U.S. ___, 105 S.Ct. 2769, 2773 (1984); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Richards* v. *U.S.*, 369 U.S. 1, 11 (1962).

[25] As Judge Wald there recognized, an agency cannot simply "pour any meaning" into the term "reasonable." There must be a recognition of the statutory guidelines provided elsewhere in the Act, and respect for the concept of fair divisions of revenues between shippers and the carriers upon whom they depend. *Farmers Union*, *supra* 734 F.2d at 1504-05.

subject to market power) reasonable—to explain "in non-conclusory terms" the conditions that would protect against abuse of market power through the imposition of unreasonable rates (Pet. App. 46a), and how those conditions would be met. This objection, however, must be rejected: an agency cannot simply recognize a "ceiling" and a "floor" and leave the establishment of reasonable rates to "market forces" without explaining how those forces will produce reasonable rates. *Farmers Union, supra* 734 F.2d at 1510; *F.P.C.* v. *Texaco*, 417 U.S. 380, 399 (1974).

It is axiomatic that agency determinations must be consistent with relevant, applicable statutory standards and policies in order to pass judicial muster. See *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 691 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-69 (1962). Thus, in evaluating the Commission's standard of "reasonableness" in the present case, the Court of Appeals quite properly looked to whether the ICC's views "reflect[ed] the policies of the statutory scheme of which they are a part" (Pet. App. 44a).[26] As to shippers subject to market power, the ICC's standard was clearly lacking. Except for a passing reference to the promotion of railroad "revenue adequacy" (Pet. App. 75a), the ICC provided no explanation at all of how its "regulatory indifference" standard would lead to rates that are a reasonable reflection of the maximum rate standards and goals established in the Interstate Commerce Act. No regard was given, for example, to the ban on "excessive profits" (Section 10707a(e)(1)), the prohibition against inequitable and inefficient distribution of a carrier's

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[26] The United States' Brief argues for consideration of Section 10505 in isolation from the standards and policies of the rest of the Act (United States Br. at 23). Such a procedure, however, is not only contrary to established principles of statutory construction (*see, e.g., U.S.* v. *Morton*, ___U.S.___, 104 S.Ct. 2769, 2773 (1984)), but is rejected by the legislative history of Section 10505 itself, which speaks of the ICC using its power under that section in a manner "consistent with the policies of this Act." H.R. Rep. No. 96-1430, *supra* at 105.

revenue burden (Section 10707a(e)(2)(C)(iii)), or the minimization of non-compensatory and marginal traffic (Section 10707a(e)(2)(C)(i) and (ii)). To the contrary, the Commission's theory dismissed as irrelevant any concern for actual rates below the level at which the railroad would appropriate "all of the economic rents" (Pet. App. 83a).

This conflict between the Commission's standard of rate reasonableness under Section 10505 and the standards and policies prescribed by Congress made it doubly important that the Court of Appeals seek out and carefully review the ICC's explanation of the reasons for its adoption of the course it chose to pursue. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-09 (1973); *Burlington Truck Lines, supra* 371 U.S. at 168. The ICC, however, had provided no explanation at all (Pet. App. 40a). The court thus had no choice but to vacate the decision. See *Motor Vehicle Manufacturers Ass'n.* v. *State Farm Mutual Automobile Insurance Co.*, ___ U.S. ___, 103 S.Ct. 2856, 2867 (1983); *Industrial Union Dep't. AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 631-32 (1980); *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).[27]

In its Petition, the ICC maintains that the court should have "deferred" to the agency on the question of reasonableness—notwithstanding the absence of any explanation of the basis for the ICC's non-conforming standard—and vacated the decision "only if it was certain that rates after the exemption would in fact be unreasonable (i.e., an abuse of market power)." ICC Pet. at 16. Such would not be deference; for the Court of Appeals to have looked the other way while the ICC employed a standard that conflicts both with

[27] The fact that the agency was making a "predictive" finding as to future rate levels does not excuse its ignorance of the standards established by Congress, or its failure to provide "an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness." *Northern Colorado Water Conservancy District* v. *F.E.R.C.*, 730 F.2d 1509, 1517 (D.C. Cir. 1984).

the Act and general administrative principles would have been a total abdication of its judicial responsibility. "Deference" would have "slip[ped] into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, ___U.S.___, 104 S.Ct. 439, 444 (1983). It is the ICC's proposed standard of "review," not the Court of Appeals' interpretation of Section 10505, that raises the substantial federal question in this case. On a matter which is indisputably subject to judicial review (i.e., an ICC exemption decision), the Commission effectively would immunize its determinations—regardless of their inconsistency with governing law—by requiring a court to make a finding that is acknowledged to be beyond its purview: that a rail rate is "unreasonable." *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 138-42 (1982).

The action by the court below was fully consistent with established principles of judicial review, was correct in the context of the issue at hand, and resulted in the merits of the exemption itself being placed back in the hands of the ICC, where they belong. No serious federal question is presented, and the case for intervention by this Court has not been made.

II

THE COURT OF APPEALS DECISION DOES NOT MATERIALLY IMPAIR THE FUTURE EXERCISE OF THE ICC'S EXEMPTION AUTHORITY

Claims are raised that the Court of Appeals decision "cripples" the ICC, and imposes new restrictions on the use of Section 10505 "so onerous as to effectively preclude future use of the exemption power." ICC Pet. at 18; Railroad Pet. at 18. See also United States Br. at 20. In point of fact, the

decision imposes no such restrictions, and raises no new material impediment to the ICC's exercise of its exemption power.

In reviewing the ICC's conclusions regarding future rates on coal traffic subject to rail market power, the Court of Appeals did not "write into" Section 10505 any requirement of "predictive" individual maximum rate determinations, *in gross* analyses under the Long-Cannon Amendment, or "guarantees" of fair divisions of economic rents. Rather, the subject of the court's analysis was the rate prediction which the ICC had *already* made (Pet. App. 74a-75a, 85a, 87a). In that context, the court found those predictions were based upon a standard which "measured" reasonableness without defining it, and effectively ignored the actual level of export coal rates so long as they were not so high as to put shippers out of business (Pet. App. 38a).[28] This is wholly at odds with the statutory scheme developed by Congress for striking a proper balance between captive shipper and carrier interests (e.g., 49 U.S.C. §§10704(a), 10707a(e)(1), 10707a(e)(2)(C)), and thus could not be approved. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, ___ U.S. ___, 104 S.Ct. 2778, 2782 n. 9 (1984); *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). Because the ICC had offered no other basis for its conclusion that rates would remain reasonable and captive shippers free from market power abuse[29] (Pet. App. 46a), remand was

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[28] The zone of reasonableness under the ICC's decision is simply "an area between an individual mine's longrun marginal cost of extraction at the current cost of capital and the world market price" (Pet. App. 86a). For shippers without competitive alternatives, this "zone" is really a license to engage in classic monopoly pricing. *Cf. United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[29] The ICC's findings regarding the effects of alleged competitive forces by definition have no application to shippers whose rates the ICC expects will be set pursuant to the Railroads' first-degree price discrimination model. *See* Pet. App. 31a-32a.

necessary. See *Michigan Consol. Gas. Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir.) *cert. denied* 364 U.S. 913 (1960).

In referring to, e.g., the Long-Cannon Amendment and the revenue adequacy standard (Pet. App. 41a-43a), the court was explaining by way of contrast why the ICC's standard of "regulatory indifference" was incompatible with the policies of the Act. It was not purporting to impose new preconditions to the granting of an exemption, or "eviscerating" Section 10505 (*see* Railroad Pet. at 21). To the contrary, its opinion ensures that Section 10505 will not itself be used to eviscerate the overall policy goals of the Act,[30] and that the ICC will instead pursue exemptions which can be granted "*consistent with the policies of Congress.*" H.R. Rep. No. 96-1430, *supra* at 105 (emphasis added). The court's decision imposes one and only one "burden" on the ICC on remand: to *explain* how its action complies with the governing statutory framework. Such is not an "evisceration;" it is the duty of every reviewing court. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968).

When an agency has made an error of law, the court's duty is to correct the error and remand to the agency, "so as to afford it the opportunity of examining the evidence and finding the facts as required by law."[31] On remand, however, the agency is in no way foreclosed from acting consistent with its assessment of relevant questions of fact and

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[30] As the Court of Appeals acknowledged, the concept of rate reasonableness "is a complex one and one whose precise definition was generally left to ICC." Pet. App. 39a. Courts cannot, however, "rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291-92 (1965).

[31] *N.L.R.B.* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of*

policy (even to the point of reaching the same result), so long as the court's mandate is not violated. *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965); *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373-74 (1939). These principles are firmly respected in the opinion below. So long as the ICC's view of market power abuse is consistent with the standards and policies prescribed elsewhere in the Act, there are no restrictions on the Commission's future action in this case. The ICC is free to deny, grant in part, or grant in full the exemption for export coal traffic.[32]

The decision below raises no new impediments to the exercise of the ICC's exemption authority in other areas, either. As Chairman Taylor explained:

> [F]rom a legal standpoint, the Circuit Court's decision will have no adverse precedential impact, and . . . as a result, the decision will not impede our continued use of the Staggers Act exemption provision to properly deregulate the railroad industry.
>
> The fact of the matter is the Circuit Court merely reaffirmed the mandate from Congress, as set forth in the Staggers Act, that we consider and balance all relevant competing interests in determining whether an exemption falls within the ambit of the National Transportation Policy. Accordingly, the judicial decision does not, in any way, limit the scope of a proposed exemption; instead, it merely directs us, in our deliberations, to perform the necessary balancing of interests intended by Congress.

Notation Vote Memorandum to the Commission from Chairman Reese Taylor, October 10, 1984, *attached to* Opposition To Motions For Stay of Issuance of Mandate Pending Petition For Writ of Certiorari, *Coal Exporters Ass'n., et al.* v. *I.C.C.* (D.C. Cir. No 83-1629), filed October 29, 1984.

New York and Vicinity, Local Union No. 638, 429 U.S. 507, 522 n. 9 (1977) (*quoting I.C.C.* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)).

[32] *See Food Marketing Institute* v. *I.C.C.*, 587 F.2d 1285 (D.C. Cir. 1978); *Chicago & N.W. Transp. Co.* v. *U.S.*, 574 F.2d 926 (7th Cir. 1978).

Chairman Taylor's observations aptly describe the effect—the entire effect—of the Court of Appeals decision. To be sure, the court vacated the exemption in this particular instance because of a legal error in the Commission's analysis of market power abuse. Upon correction of the error, however, the agency is left with as much discretion and administrative freedom as it enjoyed before. The only lasting admonition by the Court of Appeals is that which already lies at the heart of Section 10505: that the ICC's pursuit of exemptions under the Act be conducted in a manner "consistent with the policies of Congress." H.R. Rep. No. 96-1430, *supra* at 105.

III

THE COURT OF APPEALS DID NOT SUBSTITUTE ITS POLICY JUDGMENT FOR THAT OF THE ICC

The Railroads incorrectly claim that the court "exalted one element of the [national transportation] policy over all others: the policy of assuring 'reasonable' rates where there is an absence of effective competition. 49 U.S.C. §10101a(6)." Railroad Pet. at 28. The court devoted some discussion to Section 10101a(6) because the ICC had effectively *ignored* that policy goal—the only one of the fifteen elements of Section 10101a directed specifically to the interests of captive shippers.[33]

Despite the fact that it was the policy provision "most clearly related to petitioners' claims" (Pet. App. 34a), and was argued extensively before the Commission by ECTC, Coastal and numerous other opponents of the exemption,[34] the ICC gave no substantive consideration to Section

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[33] As the court noted, "[t]he Commission mentioned Section 10101a(6) only once in its opinion, and then in a footnote that implied that the provision was inapplicable." Pet. App. 35a.

[34] The United States, without any support whatsoever, asserts that the "element [of §10101a] most stressed by opponents of the exemption"

10101a(6) in its decision. The Court of Appeals was quite justified in finding this omission "troubling" (Pet. App. 35a), for it is well-settled that an agency which solicits public comments on a proposal has an obligation to respond to significant points raised by the participants.[35]

Moreover, in addressing the role of Section 10101a(6), the court did no more than affirm that under Section 10505(a)(1) *all* relevant elements of the National Transportation Policy—including Section 10101a(6)—are to be given *co-equal* consideration (Pet. App. 35a-36a n. 22).[36] This is important, since the plain language of Section 10505(a)(1) effectively prohibits the granting of an exemption where the result would be contrary to any of the enumerated goals.[37] The Court of Appeals did not purport to give Section 10101a(6) paramount consideration in the analysis under Section 10505(a);[38] it simply made clear that on remand the

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was Section 10101a(13), which speaks to predatory pricing and practices (United States Br. at 5). One is at a loss to explain why the United States has offered this inaccurate statement, unless it relates to the fact that while the ICC ignores Section 10101a(6) in its decision, it does devote three pages of discussion to Section 10101a(13).

[35] To do otherwise is to render meaningless the opportunity to comment, and preclude a reviewing court from determining whether all relevant factors have been considered by the agency. *Home Box Office, Inc.* v. *F.C.C.*, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied* 434 U.S. 829 (1977); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

[36] Even the Railroads do not dispute that consideration of all elements of Section 10101a is incorporated into the standards of Section 10505(a). *See* Railroad Pet. at 28.

[37] Section 10505(a)(1) permits an exemption when regulation is "not necessary to carry out" the National Transportation Policy. While this standard may not require that every goal be actively furthered by an exemption, it cannot be met if the exemption would *defeat* any of them—regulation in such a case would be "necessary" to carry out the goal(s) in question.

[38] It would have been justified in giving the exemption's consistency with Section 10101a(6) heightened scrutiny, however, given that it relates to an area that strikes at the heart of the ICC's decision, was argued

ICC cannot brush it aside with the blithe (and unsupported) assertion that "[e]xport coal traffic is not the captive traffic for which Congress continued rate regulation" (Pet. App. 71a n. 32).

The ICC's Petition purports to draw parallels between this case and *F.C.C.* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981) (ICC Pet. at 22-25). There are, however, significant—and indeed dispositive—distinctions between the two. In *WNCN*, the "policy" which the court of appeals improperly sought to require the FCC to apply was court-made; it was not compelled by the Communications Act (see 450 U.S. at 593). Here, by contrast, the policy of "reasonable rates in the absence of effective competition" is not only compelled by the Interstate Commerce Act itself, but its relevance and purpose are well-documented in the legislative history of the Staggers Act,[39] and its role in the exemption process under Section 10505 is not seriously disputed.[40] See, e.g., Railroad Pet. at 28. In requiring that the ICC give effect to Section 10101a(6) on a scale equal to that given other goals (e.g., the promotion of revenue adequacy), the Court of Appeals was not "substitut[ing] its own view of how best to accommodate the competing interests," (ICC Pet. at 24). It was ensuring, consistent with its proper role, that the ICC's

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extensively by the parties below, and was singled out for special concern by the House-Senate Conference Committee on the Staggers Act. H.R. Rep. No. 96-1430, *supra* at 80.

[39] H.R. Rep. No. 96-1430, *supra* at 80; S. Rep. No. 96-470, *supra* at 17; H.R. Rep. No. 96-1035, *supra* at 38-39.

[40] The ICC is wrong in its assertion that no specific guidance is provided for the advancement of the policy set forth in Section 10101a(6) (ICC Pet. at 24). The mandates for avoidance of excessive cross-subsidization, equitable allocation of a carrier's revenue needs and other administrative guidelines set forth in, *e.g.*, 49 U.S.C. §§10704(a), 10707a(e)(1) and (2)(C), and 10709(d) were specifically written to assist the ICC in maintaining reasonable rates on captive rail traffic.

action in this case would give full effect to Congress' mandate. Cf. *S.E.C.* v. *Sloan*, 436 U.S. 103, 118-20 (1978); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368-69 (1946).

CONCLUSION

The Petitions for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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